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No. 176

In the Supreme Court of the United States

OCTOBER TERM, 1939

HAGGAR COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 8–12) is reported in 38 B. T. A. 141. The opinion of the Circuit Court of Appeals (R. 28–32) is reported in 104 F. (2d) 24.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 23, 1939 (R. 32). A petition for rehearing was denied on June 17, 1939 (R. 33). The petition for a writ of certiorari was filed July 5, 1939, and was granted October 9, 1939. The

jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a capital stock tax return filed pursuant to Section 215 (f) of the National Industrial Recovery Act may be amended within the time fixed for filing returns.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statue and regulations appear in the Appendix, *infra*, pp 25–30.

STATEMENT

The pertinent facts, which the Board of Tax Appeals found (R. 8, 9–11) as stipulated (R. 16–26), may be summarized as follows:

The petitioner, a Texas corporation with its principal office in Dallas, was in existence and doing business during 1933 and prior years (R. 16). On August 22, 1933, it filed a capital stock tax return for the year ending June 30, 1933, stating an original declared value for its entire capital stock of $120,000, the par value of its shares of common then outstanding (R. 17, 24A). Simultaneously, it paid the tax of $120 shown on the return to be due (R. 17). The petitioner filed the return upon the assumption that the par value, and not the actual value, of the stock should be declared and did not give consideration to paragraph 3 of the Instruc-

tions attached to Form 707 upon which the return was made (R. 17).[1]

On September 28, 1933, the petitioner filed a second capital stock tax return for the year ending June 30, 1933, in which the value of its capital stock was declared to be $250,000 (R. 18, 24B). On the same date it paid to the Collector of Internal Revenue the tax of $250 shown to be due on that return (R. 18). The time for filing capital-stock-tax returns for that year, originally fixed as July 31, 1933, had been extended by Treasury Decisions 4368 and 4386 to September 29, 1933 (R. 17). The return was

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[1] Paragraph 3 reads as follows (R. 25):

"3. *Original declared value.*—The corporation is required by the act to declare a value for its entire capital stock as of the date of the last income-tax taxable year ending on or prior to June 30, 1933, or as of the date of organization in the case of a corporation having no income-tax taxable year ending on or prior to June 30, 1933. Such original declared value is not subject to any amendment either by the Commissioner or by the corporation. However, if the net income for the income-tax taxable year immediately following the date shown in item 7, on the reverse side, is in excess of 12½ percent of such declared value, an excess-profits tax of 5 percent is imposed by section 216 of the act on the portion of the income that is in excess of 12½ percent.

"In arriving at the original declared value, the value of the corporation's business and property as an entirety and as a going concern should be considered, and in doing so, it should look to the net worth of the corporate assets, including its surplus and undivided profits as shown by the books, also to the franchise, good will, outstanding contracts, the earning capacity of the corporation, and the market value of its shares of stock. After having done so, the corporation should then determine the original declared value for its entire capital stock according to its best judgment."

accepted by the Collector on the assumption, based upon a difference in the names appearing on the two returns, that the second one was made for a different corporate taxpayer (R. 18, 24A–B). Upon disclosure that the two returns were for the same corporation, the petitioner was advised that the second return could not be accepted (R. 18, 25–26).

On August 9, 1937, the petitioner filed a claim for refund of the $120 capital stock tax paid on August 22, 1933. This claim was rejected on November 26, 1937 (R. 19). The petitioner, on August 13, 1937, also filed a conditional claim for refund of the $250 capital stock tax paid, and a Treasury check for $312.58 ($250 plus interest) was tendered to the petitioner (R. 19). The petitioner did not cash the check, but retendered it to the Government, which refused to accept it (R. 19).

On March 15, 1934, the petitioner filed its income and excess-profits tax return for the calendar year 1933 (R. 18, 24C–F). Through inadvertence it computed its excess-profits tax exemption at 12½ per cent of $370,000, which is the total declared value shown in the two capital-stock-tax returns filed by it (R. 18–19, 24C). The Commissioner determined a deficiency calculated upon the basis of a declared value of $120,000 as shown in the petitioner's original capital-stock-tax return filed August 22, 1933 (R. 3, 11).

The petitioner contended before the Board of Tax Appeals that the value of $250,000 shown in its

second capital-stock-tax return filed September 28, 1933, should be used in the computation of the tax on excess profits (R. 11). The Board rejected that contention and sustained the Commissioner's determination (R. 11–12). The Circuit Court of Appeals affirmed the decision of the Board and held that the declared value listed in the first return was the proper basis for the computation of the excess-profits tax (R. 28–32).

SUMMARY OF ARGUMENT

Sections 215 and 216 of the National Industrial Recovery Act impose interrelated taxes on domestic corporations, namely, a capital-stock tax and a tax on the profits in excess of 12½ per centum of the capital stock. The value of the capital stock, which is declared by the taxpayer in accordance with Section 215 (f), constitutes not only the measure for the capital-stock stock tax imposed by Section 215 (a) but also the base for computing the amount of the excess profits on which a tax is imposed by Section 216 (a).

Section 215 (f) provides in terms that the value of the capital stock is to be declared by the corporate taxpayer in its "first return" for the first year and that the value so declared cannot be amended. The reason for empowering the taxpayer to determine the value of its stock is to avoid all controversy over valuation. The scheme is rendered practicable by making the capital-stock and

excess-profits taxes work against each other and by forbidding an amendment of the original declaration of value.

The terms of the statute cover this very case and forbid an amendment of the first return. The language of the statute is unambiguous and, accordingly, it is conclusive. There is no scope for a construction not in accordance with the literal interpretation adopted by the court below.

The exception read into the statute by the decisions of the Circuit Court of Appeals for the Sixth Circuit and the Court of Claims rests upon a misunderstanding of the purpose of the statute. The reasoning of those cases would put valuation in issue whenever a second return was attempted to be filed. Such a result is contrary to the intent of Congress as disclosed by the statutory provisions and by the committee reports.

Special legislation enacted for the relief of one taxpayer which reported a different value from the one it intended to report (because of a mistake of a telegraph company) indicates that Congress meant to make no exception to the literal meaning of the statute. Moreover, the legislative history of the changes made in the capital stock tax provisions of the Revenue Act of 1938 shows that Congress clearly recognized that under Section 215 (f) the value declared in the first return for the first year could not be amended for any reason. All doubts, if any ever existed, about the proper construction

of the statute, must be regarded as settled by the uniform administrative construction which should be deemed to have received legislative approval through the reenactment of the statutory provisions without material change.

The statute when construed literally raises no constitutional doubts but operates fairly in every particular. The petitioner was given complete power to determine the value of its stock and was put on notice of the consequences of its own determination. The statute, the regulations, and the instructions on Form 707 upon which the return was made all advised taxpayers of the interrelation of the capital-stock and excess-profits taxes and warned that the value originally declared by a taxpayer could not be changed.

ARGUMENT

I

THE STATUTE FORBIDS ANY AMENDMENT OF THE FIRST RETURN FILED

This is a proceeding for the redetermination of an excess profits tax deficiency for the year 1933. The sole question is whether, in computing its excess profits tax due for the calendar year 1933, the taxpayer is required to use the value of its capital stock as declared in its first capital stock tax return for the year ending June 30, 1933, or may use the value as declared in a second return which was

filed before the due date as extended by Treasury Decisions.

Sections 215 and 216 of the National Industrial Recovery Act (*infra*, pp. 25–27) impose interrelated taxes on domestic corporations, namely, a capital stock tax and an excess profits tax. For each year ending June 30, Section 215 (a) imposes upon domestic corporations carrying on or doing business an excise tax of $1 for each $1000 of the "adjusted declared value of its capital stock." Section 216 (a) imposes upon the net income of every corporation, for each income-tax taxable year ending after the close of the first capital stock tax year,[1] an excess-profits tax equivalent to 5 per centum of such portion of its net income as is in excess of 12½ per centum of "the adjusted declared value of its capital stock" determined as provided in Section 215. Thus the adjusted declared value of the capital stock which measures the tax under Section 215 also constitutes the base for ascertaining the amount of excess profits taxed under Section 216.

The adjusted declared value of the capital stock is defined in Section 215 (f), as follows: "For the first year ending June 30 * * * the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be

[1] The capital stock tax returns filed in this case were for the year ending June 30, 1933. The excess profits tax return filed March 15, 1934, was for the *calendar* year 1933 (R. 24).

amended), as of the close of its last income-tax taxable year". For any subsequent year ending June 30, the adjusted declared value is ascertained by adding or subtracting from the original declared value in accordance with actual changes made in the capital structure.[3] The taxpayer, accordingly, has absolute discretion to determine in the first instance the adjusted declared value of its capital stock for the first year which is the one involved in the present case.

The reasons for empowering the corporate taxpayer to determine the value of its capital stock are not far to seek. The so-called "actual value" of the "capital stock" of over 300,000 business corporations could not practicably be determined. The difficulties encountered in defining the terms are not inconsiderable. Compare *Ray Consolidated Copper Co* v. *United States*, 268 U. S. 373, 376–377, with *State Railroad Tax Cases*, 92 U. S. 575, 602–606.[4] In addition, even if the theory of valuation were agreed upon, an accurate appraisal of the stock equities in every corporation could not be made by the Commissioner within a reasonable

[3] Taxpayers, however, were subsequently given an opportunity to declare a new value for the year ending June 30, 1934. Revenue Act of 1934, c. 277, 48 Stat. 680, Secs. 701, 702, 703.

[4] See 1 Bonbright, *Valuation of Property* (1937), Pt. 1, pp. 3–109; Pt. III, pp. 562–595.

time or at a feasible cost.[5] These considerations were not matters of opinion merely with Congress; actual experience with the valuation provisions of the earlier federal capital stock tax had disclosed administrative difficulties that led to its repeal in 1926.[6]

The scheme of taxation erected by Sections 215 and 216 was designed to avoid controversy as to the value of the capital stock and yet to assure the determination of a reasonable value.[7] To that end,

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[5] Compare the appraisal of the railroads conducted by the Interstate Commerce Commission: Sharfman, *The Interstate Commerce Commission*, Pt. III A (1935), p. 39.

[6] See S. Rep. No. 52, 69th Cong., 1st Sess., pp. 11–12. See also the discussion of this tax in 1 Bonbright, *Valuation of Property* (1937), pp. 577–595.

[7] The report of the Senate Finance Committee accompanying H. R. 5755 contains the following statement (S. Rep. No. 114, 73d Cong., 1st Sess., p. 6):

"Section 214 provides for a new tax similar in principle to the capital stock tax which was levied from 1916 to 1926. In order to avoid controversy as to the value of the capital stock, the tax is imposed on the value declared by the corporation. A reasonable value is, however, assured by means of an excess-profits tax imposed by section 215 and based on the relation of the net income of the corporation to such declared value. A value for the capital stock once having been declared, such value may not be subsequently changed except for bona fide changes in the capital structure. The rate of this tax is very low, $1 per $1,000 of the declared value. The estimated annual yield is $80,000,000 in connection with the excess-profits tax imposed by section 215.

"Section 215 imposes an excess-profits tax on corporations. The primary object of this tax is to induce corporations automatically to declare a fair value for their corporate

the corporate taxpayer fixes the value of its stock. Its inclination to favor its own interests is effectively balanced by two other factors. First, the excess profits tax and the capital stock tax are made to work against each other. A low declaration of value, while decreasing the capital stock tax, increases the risk of a high excess profits tax. In the second place, the statute provides that the declaration of value cannot be amended, either by the Government or by the taxpayer. See *Allied Agents v. United States,* 26 F. Supp. 98 (C. Cls.), certiorari denied, October 9, 1939, No. 41, present Term.

The petitioner insists that its second return made prior to the expiration of the time for filing must be accepted by the respondent as a proper amendment of its first return. Both the Board of Tax Appeals and the court below held that under the statute there is no warrant for amending the declaration of value in the first return which is expressly made binding upon the taxpayer and the Government. This conclusion, it is submitted, is the correct one.

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stock under section 214. The rate is 5 percent on the portion of the net income in excess of 12½ percent of the adjusted declared value of the stock of the corporation. The secondary object of the tax is to subject to a somewhat higher rate of tax abnormal profits which are out of proportion to the capital of the corporation."

See also S. Rep. No. 558, 73d Cong., 2d Sess., pp. 5–6, recommending the passage of the capital stock and excess profits provisions of the Revenue Act 1934.

1. *The statute in terms forbids amendment of the first return for the first year*

Section 215(f) in terms covers the very issue presented here: "*For the first year ending June 30* in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, *as declared by the corporation in its first return under this section* (which declaration of value cannot be amended) * * *." (Italics supplied.)

The terms of the statute are unambiguous. Plainly, the value to be used is the value as declared in the *first return for the first year* and such value cannot be amended. There is no room here for a different interpretation. In order to make the plan work some one return must be selected as determinative of the tax liability. As the court below quite properly observed (R. 32): "The selection of the first, an intermediate, or the last return is a matter within the legislative discretion. In the act under consideration, the first return was selected." There is no need here to have recourse to Congressional debates to gather the meaning. Without exception the circuit courts of appeals which have faced this issue and the Board of Tax Appeals have concluded, as did the court below, that the statute, if interpreted literally, forbids amendment of the first return either before or after the time for filing has expired. *William B. Scaife & Sons Co.* v. *Driscoll*, 94 F. (2d) 664, 666 (C. C. A. 3d), certiorari denied, 305 U. S. 603; *Glenn* v. *Oertel Co.*, 97 F. (2d) 495, 496 (C. C. A. 6th); *Blake & Kendall*

Co. v. *Commissioner,* 104 F. (2d) 679 (C. C. A. 1st); *William A. Webster Co.* v. *Commissioner,* 37 B. T. A. 800.[1] Accord: *Chicago Telephone Supply Co.* v. *United States,* 23 F. Supp. 471, 473 (C. Cls.), certiorari denied, 305 U. S. 628; *Rosoff Tunnel Corp.* v. *Higgins,* 28 F. Supp. 880 (S. D. N. Y.). The language is clear and not susceptible of varying shades of meaning. Accordingly, the plain import is conclusive. "There can be no construction when there is nothing to construe." *United States* v. *Hartwell,* 6 Wall. 385, at 396. See also *Ruggles* v. *Illinois,* 108 U. S. 526, 534; *Lake County* v. *Rollins,* 130 U. S. 662, 670–671; *Hamilton* v. *Rathbone,* 175 U. S. 414, 419; *Thompson* v. *United States,* 246 U. S. 547, 551; *United States* v. *Shreveport Grain & El. Co.,* 287 U. S. 77.

2. *The reasoning in Glenn v. Oertel Co., 97 F. (2d) 495, is untenable*

The Circuit Court of Appeals for the Sixth Circuit, in *Glenn* v. *Oertel Co., supra,* held, however, that the literal meaning of the statute must give way to avoid an allegedly harsh result. The decision was followed by the Court of Claims in *Philadelphia Brewing Co.* v. *United States,* 27 F. Supp. 583. These decisions, in our opinion, are premised upon an erroneous view of the purpose of the statute. Thus the court in the *Oertel* case stresses "the necessity of a correct return for the

[1] Now pending before the Circuit Court of Appeals for the Sixth Circuit, and followed in *A. J. Crowhurst & Sons, Inc.* v. *Commissioner,* 38 B. T. A. 1072, now pending before the Circuit Court of Appeals for the Third Circuit.

first year" (see 97 F. (2d) 495, at 497; R. 31–32). That case arose upon a demurrer to the petition of the taxpayer alleging that its first return was erroneous and its second one correct. In passing upon the issue presented, the court declared (p. 496): "We cannot think that Congress intended an untrue return to be unamendable for no better or more substantial reason than that it was first in point of time". The fallacy of the argument is that the "truth" or "untruth" of the declaration of value was purposely made irrelevant. See *Chicago Telephone Supply Co.* v. *United States,* 23 F. Supp. 471, 474–475 (C. Cls.), certiorari denied, 305 U. S. 628. If Congress had desired accuracy, it would have given the Commissioner power to pass upon the valuation declared by the taxpayer. Instead, it refused the Commissioner authority to change any valuation, no matter how fantastic. The explanation, as already indicated, is that Congress desired to avoid the controversies over valuation which had been experienced under the prior revenue acts.* And adequate protection is afforded to the Government by the combined operation of the capital stock and excess profits taxes.

The theory of the *Oertel* decision, which is relied upon by the petitioner (Br. 4–5), would logically permit a taxpayer to amend its return for the first year whenever it sought in "good faith" to correct an "error." Compare *C. H. Mead Coal Co.* v.

* See notes 6 and 7, *supra.*

Commissioner, 106 F. (2d) 388 (C. C. A. 4th). The premise of the argument is that a taxpayer should be permitted to amend its first return so as to file a "correct return" for the first year as distinguished from returns for subsequent years (97 F. (2d) 495, 496–497). If the premise be sound, there is no reason for restricting the time within which an amendment may be made. Yet clearly such a result is contrary to the scheme established by Congress. It would either give some taxpayers an unfettered opportunity in later years to juggle the declaration of value so as to obtain the lowest possible combination of capital stock and excess profits taxes, or it would give rise to litigation over the "correctness" of the amended return or the "good faith" of the taxpayer in filing it. In view of the provisions of the statute and the committee reports,[10] neither intention can fairly be imputed to Congress.

Moreover, the emphasis placed upon the effect of the demurrer to the pleading and the "necessity of a correct return," suggests that the court in the *Oertel* case thought that the taxpayer must allege and prove the "error" in its first return in order to file an amended return (see 97 F. (2d) 495, at 496). In that view, every attempt to file a second or a third return would create the necessity of ascertaining which return declared the true "value" and then accepting that return. The reasoning of the *Oertel* decision would put valuation in issue no mat-

[10] See note 7, *supra*.

ter when the amended return was filed. Such a line of reasoning, it is submitted, is clearly opposed to the intent expressed in the statute. In addition, it does not aid the petitioner here. In this very case there is no assurance that the second return declared the actual value of the stock, and the Board of Tax Appeals so stated in its opinion (R. 11).

3. *The literal meaning of the statute is consonant with the intent of the Congress*

The petitioner asserts (Br. 4–9) that this Court should read into the statute an exception in favor of taxpayers who filed amended returns within the period for filing the first return. Neither the language of the statute nor the committee reports suggest that any such exception should be made.[11] Furthermore, the passage of H. R. 5258, as Private Act No. 199, by the Seventy-fifth Congress, First Session (c. 440, 50 Stat. 1014), indicates that Congress intended to make no exceptions whatever to the literal meaning of the statute. The bill was enacted for the relief of the Jackson Casket and Manufacturing Co., Jackson, Mississippi, which had filed a return under Section 105 of the Revenue Act of 1935, which is substantially the same as Section 215 of the National Industrial Recovery Act. Owing to an error attributable to a mistake of the Western Union Telegraph Company, in transmitting a mes-

[11] See note 7, *supra*.

sage from the president of the casket company, the cashier had filed the return with a declared value of $175 per share rather than $125 per share as the message from the president directed. In reporting the bill favorably, Chairman Doughton of the Ways and Means Committee and Senator Harrison, Chairman of the Senate Finance Committee, both stated that the company would secure no refund of its capital stock tax for the year 1936 as a result of the error on the part of Western Union and that the bill merely made an adjustment for subsequent years. See H. Rep. No. 777, 75th Cong., 1st Sess.; S. Rep. No. 730, 75th Cong., 1st Sess. It is significant that, even in such a meritorious case, the Chairmen of the two committees assumed, without question, that the Jackson Company could not amend its first return without the aid of Congress. This special legislation tends to show that Congress intended Section 215 (f) to be construed as it was written and that no exception was to be made even when an actual hardship was imposed on the taxpayer through no fault of its own.

Congress subsequently enacted a statute designed to create the exception which the taxpayer would read into Section 215 (f). It changed the capital stock tax provisions in the Revenue Act of 1938 so as to permit a second return to be filed before the due date of the first one. See Section 601. With respect to this change, the report of

the House Committee on Ways and Means (H. Rep. 1860, 75th Cong., 3d Sess.) contains the following explanation (at p. 62):[12]

> The new section also alleviates the rigid provision of section 105 (f) of the 1935 act that the valuation shall be as declared by the corporation in its "first" return. Errors of calculation or other errors sometimes occur in first returns, and denial of all opportunity for correction appears unduly restrictive. Accordingly, the word "first" as it appears the second time in section 105 (f) of the 1935 act, as amended, is eliminated from the corresponding language appearing in subsection (f) (2) of the new section. This will serve to give a corporation the right, so long as it acts within the time allowed for filing its return (including the last day of any extension period) for the year for which a declaration of value is required, to file subsequent returns for that year showing a different valuation, the valuation shown by the last timely return being binding.

Fifteen members of the Ways and Means Committee, including the Chairman, who considered and reported on Section 601 of the 1938 Act, also considered and reported on Section 215 of the National Industrial Recovery Act of 1933. The foregoing report, therefore, is persuasive of the understanding of the Committee that Section 215 (f)

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[12] Also found in 1 Int. Rev. Bull. 59 (1939).

(which is substantially the same as Section 105 (f) of the 1935 Act) was intended to prohibit any amendment of the capital value originally declared, even one sought to be made in a second return filed within the period for filing the first return.

This Court has often approved the salutary rule of construction that language is not to be twisted from its natural meaning simply to make it bear less heavily against a particular taxpayer. A meaning consonant with the intention of the legislature is not to be rejected under the pretense of a strict construction in favor of the taxpayer. "To do so would be not to resolve a doubt in his favor, but to say that the statute does not mean what it means." *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84, 94. See also *White* v. *United States*, 305 U. S. 281, 292. In any event the statute does not operate harshly here, for there is no suggestion that the value declared was not the value intended, and no excuse is offered for the failure to follow the clear instructions printed upon Form 707 (R. 25). But even if it were otherwise, such an argument should more properly be addressed to Congress than to the courts. *White v. United States, supra; Beattie Inv. Co.* v. *United States*, 101 F. (2d) 850 (C. C. A 8th).

Moreover, all doubts, if there ever were any, about the proper construction of the statute, should now be regarded as settled by the consistent administrative construction expressed in the regulations.

The Treasury Regulations from the beginning have, with increasing particularity, denied the right of a taxpayer to amend the value of the capital stock as declared in the first return filed under Section 215 (f) and similar provisions of the subsequent revenue acts. Thus Article 24 of Regulations 64 (1933 ed.), *infra*, pp. 27–28, provided:

> This value once having been declared may not subsequently be changed either by the corporation or by the Commissioner.

Section 215 (f) was reenacted, without material change, as Section 701 (f) of the Revenue Act of 1934 and Section 105 (f) of the 1935 Act. In the regulations promulgated under those later sections, it was again provided that the original declared value of the capital stock in the first return for the first year could not be changed, amended or corrected, either by the corporation or by the Commissioner. See Arts. 41 (a), 41 (d), 42, Regulations 64 (1934 ed.); Arts. 21 (i), 21 (l), 44, Regulations 64 (1936 ed.), *infra*, pp. 28–30.

This undeviating administrative construction, which has enjoyed legislative approval through reenacting of the statutory provisions without material change, should be regarded as establishing the proper construction of Section 215 (f). See *Brewster* v. *Gage*, 280 U. S. 327; *Helvering* v. *Bliss*, 293 U. S. 144; *Helvering* v. *Winmill*, 305 U. S. 79; *Helvering* v. *Reynolds Co.*, 306 U. S. 110.

II

THE STATUTE IS CONSTITUTIONAL

The petitioner makes a general objection (Br. 8–9) that the statute, if construed literally, is arbitrary and, hence, unconstitutional. The primary argument advanced to support this contention appears to be that the statute so construed would levy a tax without reference to economic values.

In the first place, it should be noticed, the assignments of error relied upon in both the Circuit Court of Appeals (R. 15–16) and in this Court (Pet. 6–7; Br. 3) do not challenge the validity of the statute. The petition for the writ likewise seeks review only upon the ground of a conflict with the construction adopted by other federal courts and does not ask for a consideration of the constitutional question (Pet. 2–3). Accordingly, this issue may not be raised for the first time[13] in the brief of the petitioner before this Court. *Gunning* v. *Cooley*, 281 U. S. 90, 98; *New York* v. *Irving Trust Company*, 288 U. S. 329; *Sonzinsky* v. *United States*, 300 U. S. 506, 514; *Connecticut Ry Co.* v. *Palmer*, 305 U. S. 493, 496.

Furthermore, the petitioner has shown no standing to question the constitutionality of the Act. The pleadings do not raise any issue of valuation,

[13] The constitutional issue was mentioned, apparently, in a single paragraph of the brief filed with the Board of Tax Appeals (R. 11).

and there is no evidence in the record to show that the value declared on either return represents the actual value of the shares (R. 11). If the actual value of the stock is par or less, and there is no proof to the contrary, then it is difficult to see how petitioner can assert any injury. This Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. *Tennessee Pub. Co.* v. *American Bank*, 299 U. S. 18; *Liverpool N. Y. and P. S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39. The injuries claimed by the petitioner in its brief are purely hypothetical on this record. The Court should therefore refrain from passing upon a constitutional question which may well be moot in the case at bar. *In re 620 Church St. Corp.*, 299 U. S. 24, 27; *Heald* v. *District of Columbia*, 259 U. S. 114, 123.

Moreover, the argument of the petitioner ignores the statutory scheme for having the taxpayer, who is acquainted with the facts, set the valuation and for making the capital-stock tax and the excess-profits tax work against each other. Experience had demonstrated to Congress that the capital-stock tax could be administered practicably only by avoiding all controversy over valuation (see pp. 8–11, *supra*). The administrative considerations alone indicate the reasonableness of the statute. *La Belle Iron Works* v. *United States*, 256 U. S. 377, 392–393; *Carmichael* v. *Southern Coal Co.*, 301

U. S. 495, 511, 513. The contentions advanced by the petitioner have been adequately answered by those decisions in which the issue of constitutionality was squarely presented. *Chicago Telephone Supply Co.* v. *United States,* 23 F. Supp. 471 (C. Cls.), certiorari denied, 305 U. S. 628; *Allied Agents* v. *United States,* 26 F. Supp. 98 (C. Cls.), certiorari denied, October 9, 1939, No. 41.

In addition, we submit, the statute construed literally does not operate unfairly in any particular against the petitioner. No instruction on Form 707 or in the regulations suggested that a taxpayer was required to declare the value of its stock at par. On the contrary, the instructions (R. 25) advised every corporate taxpayer to consider net worth, goodwill, and earning capacity of the shares, though it was free to declare whatever value it chose. They also informed a taxpayer of the consequences of the declaration and of the fact that no change could be made. The petitioner has offered no excuse for using par as the value other than that, for reasons not shown, it overlooked the instructions printed upon Form 707. If it was injured in any way, and there is no proof of the value of the shares, clearly the responsibility rests with the petitioner. Furthermore, the value actually declared might conceivably have worked in favor of the petitioner. For instance, if the corporation had made profits of less than 12½ per centum of the par value of the shares, it would have paid no

excess-profits tax and the capital-stock tax would have been smaller than if the value in the second return were accepted.

CONCLUSION

The statute in terms covers the very case presented and forbids the amendment of the first return. The literal interpretation adopted by the court below is consistent with the purpose of Congress to avoid controversy over valuation and is confirmed by the undeviating administrative construction published in the regulations and approved by the reenactment of the statutory provisions without material change. Such a construction raises no constitutional doubts and operates fairly upon the petitioner. The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1939.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

National Industrial Recovery Act, c. 90, 48 Stat. 195:

SEC. 215. (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * * * *

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes im-

posed by section 600 of the Revenue Act of 1926 shall, in so far as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

* * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax-taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax-taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax-taxable year ending at or

prior to the close of the year for which the tax is imposed by this section. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases (for the period specified in the preceding sentence) in the capital employed in the transaction of its business in the United States.

* * * * *

SEC. 216. (a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or in the case of a foreign corporation the adjusted declared value of capital employed in the transaction of its business in the United States) as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

* * * * *

Treasury Regulations 64 (1933 ed.), relating to he capital stock tax under Section 215 of the ational Industrial Recovery Act:

ART. 24. *Adjusted declared value.*—Pursuant to the foregoing provisions of the Act

each domestic corporation is required to declare a value for its entire capital stock as of the close of the last income-tax taxable year ending on or prior to June 30, 1933, or as of the date of organization in the case of a corporation having no income-tax taxable year ending on or prior to that date. This value once having been declared may not subsequently be changed either by the corporation or by the Commissioner.

It should be borne in mind that the original declared value will not only be used as the basis of payment of the capital stock tax for the first taxable year ended June 30, 1933, but that it will also be a primary factor in the computation of capital stock taxes for later years and the excess-profits tax imposed by section 216 of the Act, which reads as follows:

* * * * *

Treasury Regulations 64 (1934 ed.), relating to the capital stock tax under Section 701 of the Revenue Act of 1934:

ART. 41. *Definitions.*—As used in this chapter the term—

(a) *Original declared value* means the value of the capital stock as first declared by the corporation in its capital stock tax return for the first taxable year.

* * * * *

(d) *First return* means the first capital stock tax return filed by a corporation for its first taxable year.

ART. 42. *Original declared value.*—(a) In its first return (see article 41 (d)) a corporation subject to the tax must declare a definite value for its capital stock. Extreme care should be exercised by the corporation

in making this original declared value, for the reason that when the value has been declared such value cannot be changed, amended, or corrected, either by the corporation or by the Commissioner; when the right to declare such original declared value has been exercised, the right does not recur. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 702 of the Revenue Act of 1934.

(b) In the making of its original declared value a corporation is not bound by any declaration of value made by it in a return filed under the provisions of section 215 of the National Industrial Recovery Act. The corporation may exercise unrestricted judgment and discretion in determining the value to be declared for its capital stock in its first return.

Treasury Regulations 64 (1936 ed.), relating to the capital stock tax under Section 105 of the Revenue Act of 1935:

ART. 21. *Definitions.*—As used in these regulations—

* * * * * *

(i) The term "original declared value" means the value of the capital stock of a domestic corporation, or the value of the capital employed by a foreign corporation in its business in the United States, as declared by the corporation in its first return for its first taxable year.

(l) The term "first return" means the first capital stock tax return filed by a corporation for its first taxable year under section 105.

ART. 44. *Original declared value.*—(a) In its first return a corporation must declare a definite and unqualified value for its capital stock. "First return" means the first capital stock tax return filed by a corporation for its first taxable year under section 105. Extreme care should be exercised in making this original declared value, for the reason that if a return has been filed disclosing a declared value, such value cannot be changed, amended, or corrected, either by the corporation or by the Commissioner. A subsequent return declaring a different value, even though filed before the expiration of the prescribed period, is therefore not acceptable under the statute. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 106 of the Revenue Act of 1935.

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